

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE :
 :
 v. : I.D. No. 1005008059A
 :
 ISAIAH McCOY, :
 :
 Defendant. :

Submitted: December 19, 2011
Decided: January 3, 2012

ORDER

Upon Defendant Motion for Issuance of a Subpoena
for Information Otherwise Privileged.
Denied.

R. David Favata, Esquire and Deborah J. Weaver, Esquire, Department of Justice,
Dover, Delaware; attorney for the State.

Lloyd A. Schmid, Jr., Esquire and Suzanne MacPherson-Johnson, Esquire, Dover,
Delaware; attorneys for the Defendant.

WITHAM, R.J.

The issue before the Court is whether Defendant should be granted the issuance of a subpoena for information otherwise privileged.

FACTS

Isaiah McCoy (hereinafter “Defendant”) stands accused of capital murder in the shooting death of James Mumford. Through counsel, Defendant requests that this Court issue an order, pursuant to 16 *Del. C.* Chapter 9, for the issuance of a subpoena for information otherwise privileged. This request pertains to redacted records provided by the Division of Family Services (hereinafter “DFS”) at the request of Defendant. DFS provided services for Defendant and his family from 1994 until Defendant reached the age of majority. In a motion filed December 8, 2011, Defendant moves for an unredacted version of these records on the ground that they “may contain information necessary to the preparation of Isaiah McCoy’s defense in the above-styled matter.” The State opposes this motion on the grounds that it is untimely and that Defendant has failed to present a good faith basis for believing that the redacted portions of DFS records contain any relevant information necessary for the preparation of his defense.

DISCUSSION

Defendant makes this motion pursuant to 16 *Del. C.* Chapter 9. As there are 15 sections in Chapter 9, the statutory basis to which Defendant is referring is less than clear. Upon review of these 15 sections, the section most relevant is 16 *Del. C.* § 906 (18) which states as follows:

To protect the privacy of the family and the child named in a report, the

Division shall establish guidelines concerning the disclosure of information concerning the abuse and neglect involving a child. The Division may require persons to make written requests for access to records maintained by the Division. The Division shall only release information to persons who have a legitimate public safety need for such information or a need based on the health and safety of a child subject to abuse, neglect or the risk of maltreatment, and such information shall be used only for the purpose for which the information is released

Generally, upon request, Defendant is entitled to discover documents which are material to the preparation of his defense.¹ This general rule is subject to at least two considerations: the timing of the request and whether the documents are subject to privilege. Although trial of Defendant was continued at the request of Defendant's counsel,² it does not appear that the deadline for discovery was extended.³ According to the original scheduling order issued in the case, the discovery cutoff date was February 12, 2011.⁴ The State asserts that Defendant issued a subpoena *duces tecum* to the Department of Services for Children, Youth and Their Families (hereinafter "DSCYF") on July 1, 2010. The State claims that the requested records were provided shortly thereafter, albeit in redacted form to protect privileged information. Defendant's counsel said nothing of the redaction until this motion on December 8,

¹See Super. Ct. Crim. R. 16(a)(1)(C).

²*State v. McCoy*, ID. No. 1005008059, at 1 (Del. Super. June 24, 2011) (ORDER).

³The Order refers to the new trial date, an extension of the deadline for expert reports, and the date of the pretrial conference. The Order did not provide for a new discovery deadline.

⁴*State v. McCoy*, ID. No. 1005008059, at 1 (Del. Super. Aug. 24, 2010) (ORDER).

2011. During a pre-trial conference on December 6, 2011, the Court asked both parties whether there were any outstanding issues that needed to be addressed before trial. Neither side indicated any issues.

Superior Court Criminal Rule 45(b) states, “When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . upon motion after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect” Defendant’s counsel provide no background for the Court as to why this motion comes roughly one month before trial when they have had this redacted document since the summer of 2010. The State notes that its review of the redacted records does not suggest that removal of the redaction will provide any relevant information necessary to the preparation of Defendant’s defense.

In addition to the State’s valid points, both federal and state laws require that DFS safeguard the confidentiality of its records.⁵ To receive certain federal funds,⁶ the State must provide “methods to preserve the confidentiality of all records in order to protect the rights of the child and the child’s parents or guardians”⁷ Notably, this federal law does allow disclosure of records to “individuals who are the subject

⁵See 42 U.S.C. § 5106a(b)(2)(B)(viii); 45 C.F.R. § 1340.14(i)(1); 16 Del. C. § 906(b)(18); *Div. of Family Servs. v. C.W.*, 2004 WL 3625397, at *5 (Del. Fam. Nov. 5, 2004); DEP’T OF SERVS. FOR CHILDREN, YOUTH AND THEIR FAMILIES, POLICY MANUAL 15 (2011).

⁶42 U.S.C. § 5106a.

⁷42 U.S.C. § 5106a(b)(2)(B)(viii).

of the report”⁸ which would be applicable here. Nevertheless, pursuant to 16 *Del. C.* § 906(b)(18), DFS must “establish guidelines concerning the disclosure of information concerning the abuse and neglect involving a child” On behalf of DFS, DSCYF created such guidelines. The DSCYF policy manual states in part:

Rights to Review Information: Clients . . . have the right to examine information held about them in Departmental records within established limitations. . . . Prior to a client’s review of his or her files, the record must be reviewed to determine that all information contained in the record is that of the client and that the material to be reviewed does not contain: Information which, if released, would violate the confidentiality rights of others, including family members who have not given consent. The identity of a source protected by a guarantee of confidentiality.⁹

In regard to the complete withholding of information by an analogous department in Pennsylvania during a criminal case in which the files may have contained exculpatory information, the United States Supreme Court stated as follows:

To allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the Commonwealth’s compelling interest in protecting its child-abuse information. If the CYS records were made available to defendants, even through counsel, it would have a seriously adverse effect on Pennsylvania’s efforts to uncover and treat abuse.¹⁰

⁸42 *U.S.C.* § 5106a(b)(2)(B)(viii)(I).

⁹DEP’T OF SERVS. FOR CHILDREN, YOUTH AND THEIR FAMILIES, POLICY MANUAL 15 (2011).

¹⁰*Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

In that case, the U.S. Supreme Court allowed for an *in camera* review by the trial court to uncover any exculpatory information while allowing for Pennsylvania’s need to protect confidentiality.¹¹

This Defendant does not ask the Court to order that DFS unredact a specific section for a specific reason. This is not a case in which DFS has totally denied access to records.¹² This is also not a case in which the DFS records are directly relevant to the crime involved. Defendant asks the Court to unredact the redactions across the entire record for the reason that it may contain information necessary to the preparation of his defense – specifically the potential mitigation stage of this trial. To unredact on an untimely motion, without a specific reason, and without the authorization of each person whose name and identifying information has been redacted, would be contrary to Delaware law and Delaware’s well-founded public policy in protecting the confidentiality of these records and the names of the people involved. In the eyes of this Court, DSCYF complied with Defendant’s subpoena *duces tecum* while remaining within the letter of policy and the law.

¹¹*Id.* at 61.

¹²*See Doe v. Hollingsworth*, 2007 WL 1169378 (Del. Super. Apr. 18, 2007) (court denial of a DFS motion to quash a subpoena *duces tecum* for DFS records in a civil case in which defendant was accused of sexually abusing a minor female). The Court conducted *in camera* review of DFS records to determine whether there was “a reasonable basis for believing that the record contains information necessary for a fair adjudication of [the] matter.” *Id.* at *3.

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CONCLUSION

Based on the explanation above, Defendant's motion is hereby denied.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Counsel
File